

Local Union No. 80, Sheet Metal Workers International Association, AFL-CIO; and Sheet Metal Workers International Association, AFL-CIO and Limbach Company. Case 7-CC-1423

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On June 5, 1989, Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. Respondent Local Union No. 80, Sheet Metal Workers International Association, AFL-CIO, and Respondent Sheet Metal Workers International Association, AFL-CIO, filed cross-exceptions and briefs in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

FACTS

The Employer, Limbach Company, is a wholly owned subsidiary of Limbach Constructors, Inc. and is engaged in industrial and commercial mechanical contracting at various jobsites through its five branch offices located in Boston, Pittsburgh, Columbus, Detroit, and Los Angeles. The Employer maintains its principal office and place of business in the State of Michigan. Harper Mechanical Corporation is a wholly owned subsidiary of Jovis Constructors, Inc., a holding company which is in turn a wholly owned subsidiary of Limbach Constructors, Inc. Harper is engaged in mechanical contracting in the State of Florida, where it maintains its principal office and place of business.

Walter Limbach is the president, chief executive officer, and general manager of Limbach Constructors, Inc. He is also chairman of the board of the Employer. The president of the Employer is Steve Wurzel and the

president of Harper is John Fern. Wurzel sets the business and labor policies of the Employer; he has authority over and administers its day-to-day operations. Similarly, Fern sets the business and labor policies of Harper; he has authority over and administers its day-to-day operations. Walter Limbach, as the president of the parent company of both the Employer and Harper, has the authority to remove the president of either subsidiary. However, he has no input into the business policies, labor relations, or the day-to-day operations of either the Employer or Harper. Both the Employer and Harper maintain their own separate offices, business and labor relations policies, supervisors, equipment, and employees. They operate in different parts of the country, and there is no interchange of equipment, supplies, or employees.

The Employer belonged to the Metropolitan Detroit Chapter of the Sheet Metal and Air Conditioning National Association (SMACNA). Through its SMACNA membership, the Employer has been a party to a series of collective-bargaining agreements with Respondent Local Union No. 80, Sheet Metal Workers International Association, AFL-CIO (Local 80). By its terms, the most recent of these agreements was effective from June 1, 1985, through May 31, 1988.

Jovis Constructors, Inc. was formed by Limbach Constructors, Inc. specifically to obtain nonunion businesses. When Jovis acquired Harper in July 1983, Harper was operating nonunion and it continued to operate nonunion after its purchase. On August 10, 1983, General President Edward Carlough of Respondent Sheet Metal Workers International Association, AFL-CIO (the International) wrote to Walter Limbach congratulating him on the purchase of Harper and stating that a union representative would contact him in order to consummate a labor agreement with the "new shop." Charles Prey, then president of the Employer, responded by letter dated August 23, 1983, that the Employer did not "take over" Harper but that Jovis had acquired the capital stock of Harper. He added that although the Employer and Jovis were subsidiaries of the same holding company, the Employer had no authority to enter into a collective-bargaining agreement for Harper.

The International made several more attempts throughout 1983 to have the Employer execute a collective-bargaining agreement on behalf of Harper. The last attempt was made in November 1983. Limbach met with Carlough in his office. Carlough insisted that the collective-bargaining agreements which existed between the Employer and the various locals of the International covered the terms and conditions of employment of Harper's sheet metal workers. Limbach disagreed. Carlough responded that, if the Employer persisted with its position, the Union would file grievances alleging that the Employer was violating its col-

¹We note that, in his decision, the judge made several insubstantial errors. At one point he refers to Edward Carlough, general president of the International Association as "Carlough of Local 80." He also stated that Dan Harrity was employed by Limbach Company when he went to work for Harper, rather than noting that Harrity was employed by an unrelated contractor in Alaska at that time. He further incorrectly stated the date on which the business manager for Local 80 met with the Employer's Detroit employees and the date of the letter of understanding which was appended to the 1985-1988 contract between the Employer and Local 80. These mistakes do not affect the outcome of the case.

lective-bargaining agreements because Harper employees were employed under wage rates and working conditions different from those contained in the agreements. He further stated that at the conclusion of the current collective-bargaining agreements he would have his locals disclaim interest in the continued representation of the Employer's employees and refuse to allow them to enter into new agreements with the Employer. Limbach continued to adhere to his positions and suggested that such strategy would be tantamount to a secondary boycott.

In 1984 grievances were filed against the Employer by each of the local unions representing the Employer's sheet metal workers in Boston, Pittsburgh, Columbus, Detroit, and Los Angeles, respectively. Local 80 filed its grievance on December 20, 1984. The grievance alleged that Local 80's agreement with the Employer prohibited it from operating any part of its sheet metal business nonunion anywhere in the United States. On May 1, 1985, the National Joint Adjustment Board for the Sheet Metal Industry notified the International that it was deadlocked on Local 80's grievance. Despite Carlough's 1983 comments to Limbach that he would not allow the locals to enter into contracts with the Employer, on June 1, 1985, Local 80 renewed its contract with the Employer, with an expiration date of May 31, 1988.

By letter dated February 11, 1988, Carlough directed Local 80's business manager to serve notice on the Employer disclaiming the right to represent the Employer's employees after the expiration of its current collective-bargaining agreement. On February 29, 1988, Local 80 addressed a letter to the Employer stating its intention to terminate the current collective-bargaining agreement between it and the Employer at its expiration on May 31, 1988. The letter also unequivocally disclaimed any and all rights to bargain collectively for and/or on behalf of any individuals employed by the Employer. Charges were filed in this case on March 10, 1988.

On June 13, 1988, the United States District Court for the Eastern District of Michigan, Southern Division, in Civil Action 88-CV-72208-DT denied the Regional Director an injunction in a case involving the same facts and legal principles as this case.² On June 14, 1988, the business manager for Local 80, Andy Pavlich, wrote to the employees of the Employer in the Detroit area, referring to the district court decision and stating that as a result of the earlier disclaimer which took effect on May 31, 1988, the Union regarded the Employer as a nonunion employer. The letter further stated that the rights of all parties were contained in

the International constitution.³ On June 14, 1988, after receiving the above letter, the employees walked off the jobsite of the Employer's Detroit branch. Pavlich explained at the hearing that Local 80 severed its relationship with Limbach because Local 80 was "not going to deal with double-breasted contractors." The Employer asserts that the Respondents' actions have essentially put it out of business in the Detroit area.

The Unfair Labor Practice Allegations

A. *The Relationship Between the Employer and Harper*

The judge found that the Respondents did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by walking away from the bargaining relationship with the Employer after the expiration of the most recent collective-bargaining agreement on May 31, 1988, or by telling union members that the Employer was to be treated as a nonunion contractor. This conclusion was based on his finding that it was the Employer, not Harper, with whom the Respondents had a primary dispute and that, therefore, the Respondents' disclaimer and repudiation were not unlawful secondary activity. The judge determined that because of Walter Limbach's position with the Employer, Jovis Constructors, Inc., and Limbach Constructors, Inc., he appears to be the real power and the dominant figure who administers and controls the conglomerate and its subsidiaries, including the Employer and Harper. Therefore, he concluded, the Respondents' primary dispute was with the Employer and Walter Limbach, and not with Harper, because Limbach was the person who had determined that Harper would operate nonunion.

We disagree and find that the Respondents' primary labor dispute is with Harper. It is the labor relations policies of Harper that the Respondents seek to change—from a nonunion operation to a union operation. The Respondents told the Employer as well as its members that it considered the Employer to be a "double-breasted" operation because of its relationship with Harper, and that this relationship would not be tolerated. It follows, therefore, that the Respondents' actions against the Employer can be considered "primary activity" only if the Employer and Harper

³ Pertinent parts of the constitution read as follows:

Article 17, Sec. 1(a). Except as otherwise provided in this Constitution, any officer or member of this Association or any local union or council thereof may, after trial and conviction on any of the following offenses, be reprimanded, fined, removed from office, suspended or expelled as the evidence may warrant.

Sec. 1(g). Accepting employment in any shop or on any job where a strike or lockout, as recognized under this Constitution, exists, or performing any work covered by the claimed jurisdiction of this Association for any employer that is not a signatory to or bound by a collective-bargaining agreement with an affiliated local union of this International Association, unless authorized by the local union.

² This decision by the district court was later reversed by the court of appeals. *Gottfried v. Sheet Metal Workers (Limbach Co.)*, 876 F.2d 1245 (6th Cir. 1989).

can be considered a single-integrated enterprise. To meet this standard, something more than common ownership must be shown.⁴ As stated above, both the Employer and Harper maintain their own separate offices, business and labor relations policies, supervisors, equipment, and employees. They operate in different parts of the country, and there is no interchange of equipment, supplies, or employees. There is no evidence that the two employers operate a single-integrated enterprise. Accordingly, we find that any actions on the part of the Respondents directed to the Employer with the object of influencing its relationship with Harper was secondary activity.⁵

The question, therefore, becomes whether any of the Respondents' actions that were taken with secondary objectives violated Section 8(b)(4)(B) of the Act. For the reasons discussed below, we find that the Respondents violated Section 8(b)(4)(ii)(B) by disclaiming interest in representing the Employer's employees. We also find that the Respondents violated Section 8(b)(4)(i)(B) by inducing and encouraging employees not to work for the Employer, with an objective of forcing the Employer to cease doing business with Harper.

B. The 8(b)(4)(ii)(B) Allegation

Section 8(b)(4)(ii)(B) of the Act prohibits unions from threatening, coercing, or restraining any person engaged in commerce or in an industry affecting com-

merce, with an object of forcing any person to cease doing business with another. The General Counsel alleges that, by disclaiming interest in representing the Employer's employees and repudiating the 8(f) bargaining relationship between Local 80 and the Employer when the parties' contract expired in 1988, the Respondents coerced and restrained the Employer by depriving it of its source of sheet metal workers, thereby, in effect, driving it out of business as a sheet metal contractor in the Detroit area.⁶

There is no dispute that the agreement between the Employer and the Respondents was an 8(f) agreement. As the judge noted, the Board in *John Deklewa & Sons*⁷ held that, on the expiration of an 8(f) contract, either party may lawfully repudiate the bargaining relationship. This is because the enforceable 9(a) status conferred on a signatory 8(f) union expires with the bargaining agreement that is the source of the union's exclusive representational authority.⁸ After the contract expires, the 8(f) union does not enjoy even a rebuttable presumption of majority status. At that point, either party is free to repudiate the bargaining relationship.

The Respondents contend that, under *Deklewa*, they were absolutely privileged to disclaim interest in representing the Employer's employees, because their 8(f) bargaining agreement with the Employer had expired. Given that they had no ongoing obligation to bargain with the Employer, the Respondents assert, they cannot be compelled to represent the Employer's employees if they choose not to do so. The Respondents argue that their motive behind the disclaimer is irrelevant under the Board's decision in *Yellowstone Plumbing*.⁹ The General Counsel and the Employer, however, assert that, even under *Deklewa*, the Respondents' disclaimer violated Section 8(b)(4)(ii)(B) because it was made for an unlawful secondary purpose.

We find that the General Counsel and the Employer have the better of the argument.¹⁰ There is no disputing the proposition that, *in the absence of an unlawful*

⁴See *Teamsters Local 391 (Vulcan Materials)*, 208 NLRB 540 (1974), enf'd. 543 F.2d 1373 (D.C. Cir. 1976), cert. denied 430 U.S. 967 (1977); *Teamsters Local 749 (Transport, Inc.)*, 218 NLRB 1330 (1975), enf'd. 543 F.2d 417 (D.C. Cir. 1976); *Food & Commercial Workers Local 1439 (Price Enterprises)*, 271 NLRB 754 (1984); *Electrical Workers IBEW Local 2208 (Simplex Wire)*, 285 NLRB 834 (1987). See also *Teamsters Local 560 (Curtin Matheson)*, 248 NLRB 1212 (1980).

⁵Our dissenting colleague claims that Harper is not in fact a "neutral employer" within the meaning of the Act. If our colleague means that Harper is the Employer's ally, we note that he offers no evidentiary support for this proposition, and we find none. Thus, there is no probative evidence that would support a finding that Harper performed struck work for the Employer, or is part of a single-integrated enterprise with the Employer. The burden to prove such a relationship is on the Respondent, *Newspaper & Mail Deliverers (Gannett Co.)*, 271 NLRB 60, 67 (1984), and that burden plainly has not been met here. If, however, our colleague is contending that there is something special about double-breasted companies that requires the Board to deviate from its usual single-integrated employer analysis, we disagree. Our colleague has not cited any case supporting such a proposition. See *Carpenters (Baxter Construction)*, 201 NLRB 23, 24-26 (1973).

Finally, the factors on which our dissenting colleague relies to find that the labor relations of both Harper and the Employer were subject to the common control of Walter Limbach do not establish that conclusion. Those factors show at most that Walter Limbach established Harper as a nonunion entity, but there is no showing that Limbach thereafter exercised control over the labor relations of Harper. If control over the initial establishment of a nonunion entity at the moment of its creation or acquisition were sufficient to require a common control finding, then there could be no separate employer status for double-breasted operations.

⁶Respondent Sheet Metal Workers International Association concedes that the disclaimer put pressure on the Employer.

⁷282 NLRB 1375, 1386 (1987), enf'd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988).

⁸Id. at 1387.

⁹286 NLRB 993 (1987).

¹⁰In this regard, we agree with the majority of the panel of the Third Circuit Court of Appeals in *Limbach Co. v. Sheet Metal Workers*, 949 F.2d 1211 (3d Cir. 1991), vacated in relevant part and rehearing granted August 26, 1991, which found, on similar facts, that the Respondent Sheet Metal Workers International Association and four of its local unions had violated Sec. 8(b)(4)(ii)(B) by disclaiming interest in representing employees of the Employer. 949 F.2d at 1221-1228. However, although we agree with the court's reasoning, we wish to make clear that, notwithstanding certain inadvertent statements in the court's opinion, unions and employers are not free to repudiate their 8(f) agreements while those agreements are in force. *Deklewa* holds that either party may repudiate, and walk away from, a former 8(f) relationship, but only after the 8(f) agreement creating that relationship has expired.

objective, a union without a collective-bargaining agreement may lawfully disclaim interest in representing a group of employees.¹¹ In this case, however, an unlawful objective existed.¹² Carlough warned Walter Limbach in November 1983, when the latter opposed applying the parties' contract to Harper, that the Respondents' locals would disclaim interest in representing the Employer's employees when their existing collective-bargaining agreements expired. Although Local 80 renewed its contract with the Employer in 1985, it did disclaim interest in representing the Employer's employees when Carlough directed it to do so in 1988, after the contract expired. Moreover, in the interim, Carlough wrote and published an article in the May 1986 "Sheet Metal Workers Journal," and made remarks at the Respondents' 1986 general convention, indicating that Sheet Metal Workers locals in various cities had disclaimed interest in representing the Employer's employees because of the Employer's practice of double-breasting.¹³ Thus, although Carlough's threat to Walter Limbach, as well as his 1986 article and convention remarks, antedated the 10(b) period and are not alleged as separate violations, they point unmistakably to the conclusion, which we draw, that the Respondents' disclaimer was motivated, at least in part, by their desire to force the unionization of Harper.¹⁴

¹¹ See, e.g., *Electrical Workers IBEW Local 58 (Steinmetz Electrical)*, 234 NLRB 633, 634-635 (1978) ("This Board cannot compel a union to represent employees it no longer desires to represent, and a refusal to bargain over such employees does not violate Section 8(b)(3) of the Act."); *Corrugated Asbestos Contractors v. NLRB*, 458 F.2d 683, 687 (5th Cir. 1972) ("We cannot force a union to continue, against its wishes, a relationship that is in its very nature predicated upon voluntariness and consent.")

¹² *Corrugated Asbestos Contractors*, supra, on which the Respondents rely, thus is distinguishable from this case. In *Corrugated*, the union disclaimed interest in representing the employer's employees in order to avoid further jurisdictional disputes of the sort that had already arisen and that the union feared would continue to arise. There was, therefore, no bad faith on the part of the union, nor any unlawful object of its disclaimer.

¹³ Carlough's convention remarks contained a strong hint that the local unions that had disclaimed interest in representing the Employer's employees in several other cities would welcome the Employer back into the union fold if it discontinued its practice of double-breasting. Carlough's remarks (and the entire context of this dispute, for that matter) indicate unmistakably that the Respondents' disclaimers in this case were not, as they contend, unequivocal and final, but would have been rescinded if Harper had recognized the Respondents. To draw any other conclusion, we would have to believe the unbelievable—that the Respondents would continue to reject any bargaining relationship with the Employer even if Harper were to accept unionization.

¹⁴ The Respondents except to the judge's failure to find that this evidence is time-barred by Sec. 10(b). We note, however, that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 416 (1960) (citation omitted).

It is this secondary object—to enmesh the Employer in the Respondents' dispute with Harper, with the aim of compelling the latter to recognize the Respondents—that renders the Respondents' disclaimers unlawful, and that distinguishes them from other disclaimers the Board has approved. In that respect, the Respondents' disclaimer is like many other actions, such as striking and picketing, which may be perfectly lawful if taken without a secondary objective, but which are condemned by the Act if done for an unlawful secondary purpose.¹⁵ Nothing in *Deklewa* suggests, let alone mandates, a different result. *Deklewa* delineated the rights and responsibilities under Section 8(a)(5) and 8(b)(3) of construction industry employers and unions with 8(f) bargaining relationships. The Board in *Deklewa* was not concerned with, and did not decide, whether an 8(f) union's actions that were consistent with its bargaining responsibilities under Section 8(b)(3) would also be immune from scrutiny under Section 8(b)(4)(B). Thus, the Board's statement in *Deklewa* that "upon the expiration of [8(f)] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship,"¹⁶ means that an 8(f) union may repudiate its bargaining relationship at the expiration of the agreement *without violating Section 8(b)(3)*. It does not mean that such a disclaimer cannot violate Section 8(b)(4)(B) if it is made for an unlawful secondary purpose.

The Respondents argue that *Yellowstone Plumbing* requires a finding that their disclaimers were lawful, even if undertaken for a secondary purpose. In *Yellowstone Plumbing*, the employer was held to have lawfully withdrawn recognition from an 8(f) union on expiration of the parties' bargaining agreement, even though the employer had engaged in a number of unfair labor practices related to its refusal to continue to recognize the union. The Respondents and our dissenting colleague contend that if we find a violation in this case, we will be holding unions to a different and more stringent standard of behavior than that imposed on employers. We reject that contention. The employer in *Yellowstone Plumbing*, unlike the Respondents here, did not withdraw from the 8(f) relationship as a means of attaining another, unlawful, objective.¹⁷ In finding

¹⁵ Employers, too, may violate the Act by taking actions for unlawful purposes that, if taken for other reasons, would be lawful. See, e.g., *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enf'd. 832 F.2d 1086 (7th Cir. 1987) (although supervisors normally are not protected under the Act, an employer may violate Sec. 8(a)(1) by retaliating against a supervisor if the retaliation is motivated by, and interferes with, the exercise of employees' statutory rights).

¹⁶ 282 NLRB at 1377-1378.

¹⁷ The General Counsel in *Yellowstone Plumbing* asserted that the employer was not free to repudiate the 8(f) relationship even after the contract had expired because it had refused to bargain for a new contract on the basis of a tainted decertification petition. The Board

Continued

the 8(b)(4)(ii)(B) violation in this case, we are thus not holding employers and unions to different standards. We simply find that an otherwise lawful repudiation of an 8(f) bargaining relationship may violate the Act if it is undertaken as a means of committing, or giving effect to, another, unlawful, act.

Having found that the Respondents violated Section 8(b)(4)(ii)(B) by disclaiming interest in representing the Employer's employees with an object of forcing Harper to recognize the Respondents, we shall order them to cease and desist and to rescind their disclaimers. However, we shall decline the General Counsel's invitation to require the Respondents to bargain with the Employer and to include the Employer in the terms of the new collective-bargaining agreement entered into by Local 80 and SMACNA effective June 1, 1988. In our view, to issue an affirmative bargaining order would violate the principle laid down in *Deklewa*, that an 8(f) union has no further bargaining obligation after the expiration of the contract; while requiring the Respondents to implement contractual terms that they have not agreed to (vis-a-vis the Employer) is a remedy precluded by the Supreme Court's holding in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

C. The 8(b)(4)(i)(B) Allegation

We disagree with the judge's conclusion that the Respondents did not violate Section 8(b)(4)(i)(B) by telling members that as of June, 14, 1988, the Employer was to be treated as a nonunion contractor and referring members to the International constitution and bylaws which set forth the penalties for members who work for such an employer. Section 8(b)(4)(i)(B) makes it an unfair labor practice for a union to induce or encourage an individual to refuse, in the course of employment, to perform services where an object of such is to force an employer to cease doing business with another employer. Regardless of whether a union could, in other circumstances, impose penalties on its members for working for a nonunion employer, the Respondents may not threaten to do so here because the threats are in furtherance of an unlawful secondary objective.

On March 21, 1988, Local 80 held a special meeting for its members employed by the Employer. At this meeting, Local 80's business manager, Andy Pavlich, told the members that because the Employer was double-breasted, it would not have a contract with Local 80 after the expiration of its contract on May 31, 1988.

found that the employer's repudiation was lawful under *Deklewa*, even though, as the General Counsel argued, the employer could not have lawfully withdrawn recognition on the basis of the tainted petition. The repudiation thus was, in itself, a lawful way of ending the bargaining relationship, and was not rendered invalid merely by taking place in the context of several *unlawful* actions, because it was not a means of *effecting* any of those actions.

Members asked if they had to quit working for the Employer after that date. Pavlich replied that they should read International's constitution and bylaws, copies of which were distributed to all members present. On June 14, 1988, Local 80 sent a letter to its members employed by the Employer advising them that as a result of the Respondents' prior disclaimer the Employer was regarded as a nonunion employer. The letter further stated that the rights of all parties were set forth in the International constitution. The March 21 and June 14, 1988 comments are alleged as violations of the Act.

The complaint also refers to an article written by International President Carlough in the May 1986 edition of the "Sheet Metal Workers Journal," and remarks made by Carlough at the Respondents' August 25, 1986 general convention.¹⁸ Although this article was written and published, and Carlough's remarks were made, outside of the 10(b) period and are not alleged as violations of the Act, they shed light on the Respondents' motives for encouraging their members not to work for the Employer.¹⁹ In this article, Carlough used the Employer as an example of the type of employer, running a double-breasted shop, against whom the Respondents were reacting. He also discussed certain changes in the Respondents' rules and policies designed to combat double-breasting in general.

The changes announced in this article dealt with the additional penalties that would be invoked against members who worked for nonunion employers. These penalties included the revocation of withdrawal cards, elimination or deferral of pension fund benefits—such as early retirement benefits, disability benefits, death benefits, Supplemental Medicare Wraparound, and pension COLA—as well as loss of other benefits such as free prescription drugs, prepaid legal services, and health and welfare coverage. The article stated that these changes would apply to "those few SMWIA members who make the mistake of deserting our union by bolting to the side of non-union contractors."

In *Scofield v. NLRB*,²⁰ the Supreme Court set forth the standard for the lawful imposition of penalties by a union on a member as a matter of internal union discipline. A union may impose fines on its members if the provision was properly adopted, supports a legitimate union interest, impairs no statutory labor law policy, and is reasonably enforced.²¹ Here, there is no

¹⁸ This article and Carlough's remarks were quoted at length in the judge's decision.

¹⁹ See fn. 14, *supra*.

²⁰ 394 U.S. 423 (1969).

²¹ *Id.* at 430. Contrary to our dissenting colleague, the *Scofield* principles apply with equal force to threats to impose internal union discipline and to the actual imposition of such disciplines. See, e.g., *Bricklayers Local 6 (Linbeck Construction)*, 185 NLRB 756, 761 (1970).

contention that the rule against working for nonunion employers was not properly adopted or that it does not support a legitimate union interest. The course of conduct pursued, however, by the Respondents between 1983 and 1988 establishes that the Respondents' actions in 1988 in calling the attention of the employees to the rules against working for a nonunion employer were not in support of a legitimate union interest but rather were in furtherance of an unlawful secondary objective. The Respondents made clear in 1983 that they were interested in having their collective-bargaining agreement with the Employer extended to the employees of Harper or having the Employer cease doing business with Harper. Union President Carlough told Walter Limbach in their November 1983 meeting that if the Respondents' position was not adopted by the Employer, the Respondents would disclaim interest in representing its employees. Further, in his 1986 remarks and article, Union President Carlough announced that the Union intended to make certain changes in its rules in order to combat what it thought were double-breasted employers.

In March and June 1988, in conjunction with the disclaimer of interest in representing the Employer's employees with an objective of influencing the Employer's relationship with Harper, the Respondents directed their members' attention to the constitution and bylaws as to the consequences of working for the Employer. This reliance on the constitution and bylaws clearly constituted an attempt to induce or encourage individuals to cease providing services to the Employer because of its relationship with Harper. This is a secondary objective and is exactly what Section 8(b)(4)(i)(B) reaches.²²

The situation here is analogous to that in which a union maintains a internal rule against crossing a picket line, and applies that rule to induce or encourage its members to honor a sympathy strike. In these situations, the Board has found that although the rule itself may be valid, seeking to enforce the rule in such a way as to pressure a secondary employer is unlawful.²³ Similarly here, although the Respondent's rule may be valid, its use to induce employees to withhold service from the Employer for a proscribed secondary reason was unlawful.²⁴

²² *Electrical Workers IBEW Local 3 (Eastern States)*, 205 NLRB 270, 273 (1973); *Electrical Workers IBEW Local 3 (Ericsson Telecommunications)*, 257 NLRB 1358, 1370 (1981).

²³ See *Carpenters Local 316 (Thornhill Construction)*, 283 NLRB 81 (1987); *Plumbers (Hanson Plumbing)*, 277 NLRB 1231 (1985), *enfd.* 827 F.2d 579 (9th Cir. 1987); *Sheet Metal Workers Local 252 (S. L. Miller)*, 166 NLRB 262 (1967), *enfd.* 429 F.2d 1244 (9th Cir. 1970).

²⁴ Contrary to our dissenting colleague, *Yellowstone Plumbing* does not require dismissal of the 8(b)(4)(i)(B) allegation in this case. When the employer in *Yellowstone Plumbing*, before lawfully withdrawing from its 8(f) relationship with the union, informed employees that it was going nonunion, it acted lawfully because its state-

We reach this result despite the Third Circuit's apparently contradictory holding in *Limbach Co. v. Sheet Metal Workers*, *supra*. The court found that the Employer's employees in that case quit rather than go on strike, and thus could not be found to have refused to perform services within the course of their employment. 137 LRRM at 2800–2802. It is not entirely clear from the language employed by the court whether it was holding that, as a matter of law, a mass “quit” on the part of employees can never be found to constitute a strike for 8(b)(4) purposes. If that was the court's holding, however, we respectfully disagree with it. The Board has held that when employees “quit” en masse with a secondary objective, particularly under circumstances that strongly suggest that the “quitting” is not intended to outlive the perceived need to apply secondary pressure, the employees' action must be viewed as that which, in reality, it is—a strike. *Electrical Workers IBEW Local 760 (Roane-Anderson Co.)*, 82 NLRB 696, 704–712 (1949).²⁵ That reasoning applies here. We find nothing in the record to indicate that the Respondents were pressuring their members to leave their employment with the Employer permanently (any more than the Respondents themselves were permanently disclaiming interest in representing those employees). We have no doubt that, had their tactics succeeded, the Respondents would have permitted, and even encouraged, their members to go back to work for the Employer. Accordingly, we find that the Respondents attempted to, and did, induce their members to engage in a strike against the Employer, within the meaning of Section 8(b)(4)(i)(B).²⁶

ments were not made in furtherance of any unlawful act. Here, by contrast, we have found that the Respondents advised their members of their responsibilities under the constitution and bylaws in an attempt to induce them to cease working for the Employer. It is the Respondents' secondary purpose in so advising their members that renders those statements unlawful.

²⁵ Sec. 501(b) of the Act defines a strike as “any strike or other concerted stoppage of work by employees[.]” We think that definition is broad enough to encompass mass “quits.” We do not, therefore, have to decide whether the Respondents attempted to induce the Employer's employees to engage in a “refusal in the course of their employment”

²⁶ The court in *Limbach Co. v. Sheet Metal Workers*, *supra* at 1221, relied on the Fourth Circuit's decision in *LTV Electrosystems v. NLRB*, 408 F.2d 1122, 1127 (1969), for the proposition that “individuals who permanently quit are not on strike.” 137 LRRM at 2801. With due respect to the court, we do not think the Fourth Circuit's opinion can be read so broadly. In the first place, the court in *LTV* decided only that the employees in question were not discharged; on the facts of the case, it did not have to determine whether the employees quit or struck. In any event, *LTV* involved employees who, the court found, indicated unequivocally their intention to end their relationship with the employer. As we have stated, the record here indicates that the Respondents intended for their members to cease working for the Employer only as long as necessary to accomplish their unlawful secondary objective. Thus, even if we agreed with the Third Circuit that “individuals who permanently quit are not on strike,” we still would find that the Respondents vio-

Continued

Accordingly, we find that the Respondents have violated Section 8(b)(4)(i)(B) by inducing or encouraging the employees of the Employer to cease working for the Employer where the objective was to have the Employer cease doing business with Harper.

On the basis of the facts and the entire record in the case, the Board makes the following

CONCLUSION OF LAW

By the conduct described above, the Respondent Unions have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

THE REMEDY

Having found that the Respondent Unions have engaged in certain unfair labor practices, we shall order them to cease and desist from inducing or encouraging any individual employed by the Employer, Limbach Company, or any other employer to engage in strike or concerted refusal work on any materials or to perform any services if an object is to force Limbach Company or any other person to cease doing business with Harper Mechanical Corporation. We shall also order them to cease and desist from disclaiming interest in representing employees of the employer or otherwise repudiating its 8(f) bargaining relationship with the Employer, where an object of such disclaimer or repudiation is to force the Employer or any other person to cease doing business with Harper, and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondents, Local Union 80, Sheet Metal Workers International Association, AFL-CIO and Sheet Metal Workers International Association, AFL-CIO, their officers, agents, and representatives shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by Limbach Company or any other employer to engage in a strike or refusal to work on any materials or to perform any services²⁷ if an object is to force Limbach Company or any other person to cease doing business with Harper Mechanical Corporation.

(b) Disclaiming interest in representing employees of Limbach Company, or otherwise repudiating its 8(f) bargaining relationship with Limbach Company, where an object of such disclaimer or repudiation is to force

lated Sec. 8(b)(4)(i)(B), because they did not attempt to persuade their members to quit on a permanent basis.”

²⁷This includes, but is not limited to, implying or suggesting to any member of the Respondents that refraining from a strike or concerted refusal to perform work for Limbach Company is or could be a violation of the International Union’s constitution and bylaws.

Limbach Company or any other person to cease doing business with Harper Mechanical Corporation.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind Local 80’s February 29, 1988 disclaimer of interest in representing individuals employed by Limbach Company.

(b) Post at the Respondent Unions’ offices and meeting halls copies of the attached notice marked “Appendix.”²⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents’ authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of the notice to the Regional Director for Region 7 for posting by Limbach Company, if it is willing, in all locations where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

MEMBER DEVANEY, dissenting.

I do not agree with the majority that the Respondents violated 8(b)(4)(ii)(B) by withdrawing from their Section 8(f) relationship with the Employer on the expiration of the parties’ collective-bargaining agreement. I also dissent from my colleagues’ finding that the Respondents violated Section 8(b)(4)(i)(B) of the Act when they subsequently truthfully advised their members that the Unions no longer had a bargaining relationship with the Employer and then informed their members of the existence of presumptively valid internal union disciplinary rules.

Regarding the Respondents’ withdrawal from bargaining, the record shows that the Respondents and the Employer had been parties to a series of 8(f) collective-bargaining agreements. There also is evidence that the Employer formed Jovis Constructors, Inc. as a subsidiary corporation specifically to obtain nonunion construction work. In July 1983, Jovis acquired Harper which operated as a nonunion contractor and has continued to do so after its purchase. Thereafter, the Respondents made several attempts to negotiate an agreement covering Harper’s employees. The Employer, on

²⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Harper's behalf, rejected those efforts. Despite the Respondents' resulting threat in November 1983 to withdraw from further bargaining with the Employer, the parties subsequently did negotiate a successor agreement that was effective from June 1, 1985, through May 31, 1988. When that agreement expired, however, the Respondents disclaimed any interest in continuing to represent the Employer's employees because of its refusal to include Harper's employees in the parties' contract negotiations.

The Board held in *John Deklewa & Sons*¹ that either party can legally repudiate the bargaining relationship on the expiration of an 8(f) collective-bargaining agreement. Here, the Respondents did nothing more than that which the Board sanctioned in *Deklewa*. Nevertheless, my colleagues examine the Respondents' motive for withdrawing from bargaining with the Employer. Because they find that the Respondents had an unlawful secondary objective for terminating their bargaining relationship, i.e., organizing Harper's employees, my colleagues conclude that the Respondent violated Section 8(b)(4)(ii)(B). I strongly disagree. I believe that parties can lawfully refuse to negotiate over a successor agreement on the expiration of an 8(f) agreement regardless of their motivation for doing so. The majority in this case has seriously undermined the Board's holding in *Deklewa* by creating an unwarranted restriction on a party's right to withdraw from 8(f) bargaining.

Even assuming that the Respondent's motivation is a critical consideration, I still would not find that the Respondents violated Section 8(b)(4)(ii)(B). The evidence shows that Limbach created Jovis as a nonunion subsidiary which in turn purchased Harper, the object of the Respondents' attempt to organize.

As Chief Judge Sloviter stated in her separate opinion in *Limbach Co. v. Sheet Metal Workers*,² the Act's secondary boycott rules were not designed for the double-breasted employer situation, and should not impede the general approach of Congress in the labor relations area—to allow each party to use economic and bargaining strategies to exert pressure on the other.³ By finding that the Respondents' conduct was unlawful here, my colleagues deprive Respondents of their traditional economic weapons in a dispute that Chief Judge Sloviter described as “essentially an economic struggle between an employer and its employees.” Thus, in the

context of these disputes, Harper is not in fact a “neutral employer.”⁴ As Judge Sloviter pointed out, there is “extensive integration of Limbach Incorporated's operations” under which the Respondent and Harper both perform as corporate subsidiaries. No “stranger to the controversy” is enmeshed as a result of the Respondents' actions. In my view, the secondary boycott provisions of the Act are inapplicable to the Respondents' withdrawal from bargaining in the present case.⁵

In finding this violation, my colleagues effectively hold unions to a different standard than that to which the Board holds employers in like circumstances. In *Yellowstone Plumbing*, 286 NLRB 993 (1987), the Board concluded that an employer's “bad-faith” motive in withdrawing recognition from an 8(f) union at the expiration of the contract did not warrant a finding that the employer violated Section 8(a)(5) by its refusal to bargain with the union. Although the majority concludes that *Yellowstone* is distinguishable here because in that case the employer was not “effecting” any unlawful actions in severing the bargaining relationship, it seems to me that this is really a difference without a distinction in that there is a “bad-faith” motive for the withdrawal in either case. Thus, I believe that the situation in *Yellowstone* is comparable to the present case.

Additionally, the majority here ignores the Board's further finding in *Yellowstone*, supra, 286 NLRB at 994, that the employer there committed no 8(a)(1) violation when it subsequently told its employees that the shop would be nonunion and employees' wages would

¹ 282 NLRB 1375, 1386 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988).

² *Limbach Co. v. Sheet Metal Workers*, 949 F.2d 1211, 1237–1240 (3d Cir. 1991), vacated in relevant part and rehearing granted August 26, 1991.

³ See Senate Committee on Education & Labor, S. Rep. No. 573, 74th Cong., 1st Sess. 2 (1935) (“[d]isputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces”).

⁴ Even if an examination of the Union's motives were appropriate here, I maintain that Harper's status as Limbach Constructor's wholly owned subsidiary gives Limbach the effective right to control work done by Harper and control over Harper's labor relations, and thus that the Unions' actions with respect to this dispute do not constitute secondary activity. Cf. *Longshoremen ILWU (California Cartage)*, 278 NLRB 220, 221 (1986), modified 822 F.2d 1203 (D.C. Cir. 1987). The judge found, based on credited evidence, that Walter Limbach, president of Limbach Constructors and chairman of the board of the Employer, had the authority to decide whether Harper would operate under the Union's 8(f) agreement; had orchestrated the purchase of nonunion Harper; had set the structure for union and nonunion operations; and had the authority to terminate the heads of Limbach Company and Harper and to review their operating plans. Thus, I would agree with the judge that Walter Limbach was a logical individual for the Union to approach respecting the application of the 8(f) agreement to Harper employees, because it appears that any decision on the matter made at the Harper Corporation's level would have to be cleared through him. Without commenting on the factual scenarios in other cases involving double-breasted employers, I read these facts as giving sufficient common control over labor relations to render treating Limbach and Harper as “strangers” a questionable extension of the secondary boycott provisions.

⁵ I view the present case as distinguishable from *Carpenters (Baxter Construction)*, 201 NLRB 23 (1973), cited by the majority, because the two employers in that case did not operate under the same corporate umbrella and thus there was no effective common control over both operations as exists here.

not be lowered because the shop was nonunion⁶ Just as the employer in *Yellowstone* was free to truthfully advise its employees that the union would no longer represent them, the Respondents in this case were free to truthfully advise their members that the Employer no longer had a bargaining relationship with them. The Respondents' further statements advising union members of their rights and obligations under the Respondents' constitution and bylaws were merely additional statements regarding the Employer's new nonunion status and are in my view indistinguishable from the employer's postwithdrawal statements in *Yellowstone*.⁷

The majority's reliance on *Scofield v. NLRB*, 394 U.S. 423 (1969), is misplaced. In *Scofield*, the Court established a standard for determining the lawfulness of internal union discipline imposed on members. Here, there is no allegation that the Respondents actually attempted to impose penalties on employees who continued to work for the Employer. Accordingly, I reject the majority's contention that Respondents' informing members of otherwise valid internal union rules infringed on their Section 7 rights. Because the Respondents lawfully withdrew from the 8(f) bargaining relationship with the Employer, the Respondents had a lawful primary purpose in truthfully advising their members of the change in status and reminding members of the presumptively valid internal disciplinary rules.⁸

For these reasons, I would find that the Respondents did not violate the Act either by withdrawing from its 8(f) relationship with the Employer or by truthfully informing members of that action and of the resulting

consequences. Thus, I would dismiss the instant complaint.⁹

⁹I note that the Third Circuit also reached this result in *Limbach Co. v. Sheet Metal Workers*, supra at fn. 2, and that this issue is not the subject of the court's pending rehearing of the case.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT induce or encourage any individual employed by Limbach Company or any other employer to engage in a strike or refusal to work on any materials or to perform any services if an object is to force Limbach Company or any other person to cease doing business with Harper Mechanical Corporation.

WE WILL NOT disclaim interest in representing employees of Limbach Company, or otherwise repudiate our 8(f) bargaining relationship with Limbach Company, with an object of forcing Limbach Company or any other person to cease doing business with Harper Mechanical Corporation.

WE WILL rescind Local 80's February 11, 1988 disclaimer of interest in representing individuals employed by Limbach Company.

LOCAL UNION NO. 80, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO; AND SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

Mark D. Rubin, Esq., for the General Counsel.

Samuel McKnight, Esq., of Southfield, Michigan, for the Respondent Local 80, Sheet Metal Workers International Association, AFL-CIO.

Donald W. Fisher, Esq., of Toledo, Ohio, for the Respondent Sheet Metal Workers International Association, AFL-CIO.

Robert D. Randolph, Esq., of Pittsburgh, Pennsylvania, for the Charging Party Limbach Company.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The original complaint filed by the Limbach Company on March 10, 1988, was served by certified mail on Local 80, Sheet Metal Workers International Association, AFL-CIO (Local 80), and International Association of Sheet Metal Workers AFL-CIO (the International), the Respondents, on or about March 10, 1988. An amended charge filed on May 25, 1988, was served by certified mail on the Respondents on or about the

⁶In *Gottfried v. Sheet Metal Workers Local 80*, 876 F.2d 1245, 1250 (6th Cir. 1989), the court opined that *Yellowstone Plumbing* may be distinguishable from the instant case because the employer in *Yellowstone* did not have an illegal objective in withdrawing from the bargaining relationship. However, in *Yellowstone*, the Board found that the employer unlawfully threatened employees with plant closure if the plant did not become nonunion, unlawfully encouraged employees to decertify the union, and unlawfully laid off a leading union supporter. Nevertheless, despite this evidence of union animus, the Board held that the employer did not unlawfully withdraw recognition from the union at the conclusion of the 8(f) agreement.

⁷I do not find *Yellowstone* distinguishable from the present situation. In this case, as in *Yellowstone*, the Respondent has lawfully withdrawn from an 8(f) relationship with the Employer and then informed the affected employees as to the possible consequences of that action. I would treat the Union here in the same manner that the Board treated the employer in *Yellowstone*. Moreover, unlike the employer in that case, the Respondents' remarks to employees here did not occur in the context of any unfair labor practice violations.

⁸*Bricklayers Local 6 (Linbeck Construction)*, 185 NLRB 756, 761 (1991), which my colleagues rely on to support the application of *Scofield* here, is inapposite because the union's threat to fine employee-members in that case was made in furtherance of its effort to cause the employer to discriminate against an employee which the Board found violated Sec. 8(a)(2). Because I would find that the Respondents in this case lawfully withdrew from the 8(f) relationship with the Employer, it is clear that the Respondents' conduct in truthfully advising members of the existence of internal union rules did not arise in connection with any unfair labor practices.

same date. A complaint and notice of hearing was issued on June 2, 1988. In the complaint, among other things, it was alleged that the Respondents had engaged in violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act).

The Respondents filed timely answers denying that they had committed the unfair labor practice alleged.

I heard the case at Detroit, Michigan, on June 29 and 30, 1988, and January 24 and 25, 1989. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of facts and conclusions of law, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACTS, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE EMPLOYERS INVOLVED

The Charging Party is, and has been at all times material, a corporation duly organized under, and existing by virtue of the laws of the Commonwealth of Pennsylvania.

At all times material, the Charging Party has maintained its principal Michigan office and place of business at 924 Featherstone Road, Pontiac, Michigan, where it is, and has been at all times material, engaged in the business of industrial and commercial mechanical contracting at various jobsites in the State of Michigan, and other States.

During the year ending December 31, 1987, a representative period, the Charging Party purchased goods and materials valued in excess of \$50,000 from points located outside the State of Michigan, and had the goods and materials shipped directly to its jobsites within the State of Michigan, including the Cobo Hall expansion jobsite.

Harper Mechanical Corporation (Harper) is, and has been at all times material, a corporation duly organized under and existing by virtue of the laws of the State of Florida.

At all times material, Harper has maintained its principal office and place of business at 5401 Benchmark Lane, Sanford, Florida, where it is, and has been at all times material, engaged in the business of mechanical contracting.

During the year ending December 31, 1987, a representative period, Harper purchased goods and materials valued in excess of \$50,000 from points located outside the State of Florida, and had the goods and materials shipped directly to its jobsites within the State of Florida.

Each corporation of the Charging Party and Harper are now, and have been at all times material, employers and/or a persons engaged in commerce or in any industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Presently the top parent corporation of the Charging Party is Compangie General Jes Eau, a French corporation. The Charging Party and Harper fit into the corporate structure of Compangie General as set forth in the attached Appendix.

II. THE LABOR UNION INVOLVED

Each of the Respondents is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

1. The corporate operations of Limbach Holdings, Inc. and Limbach Constructors, Inc.

Walter F. Limbach testified that he is president of Limbach Holdings, Inc. and Limbach Constructors, Inc. He is also the chairman of the board of Limbach Holdings' subsidiaries, Linc Corporation and Limbach Company. Limbach is chief executive officer of Limbach Holdings, Inc. and of Limbach Constructors, Inc., and he has the responsibilities of general manager of both companies.

Limbach Constructors, Inc. is the parent corporation of Limbach Company (the Charging Party) and Jovis Constructors, Inc. (a holding company) which is the parent of Harper Mechanical Corporation. Limbach Company and Harper are operating companies.

Although Walter F. Limbach is responsible for the management of Limbach Constructors, Inc. and Limbach Holdings, Inc., he denied that he has "any involvement" in the "day-to-day operations" of Limbach Company or Harper or in setting or carrying out their labor policies. Jovis Constructors, Inc., the holding company for Harper, is a nonoperating company, whose only "significant asset" is its ownership of the capital stock of Harper.

Walter F. Limbach testified concerning the purpose of the corporate structure detailed above, which was set up in 1981.

The objective or purpose of Limbach Constructors was to acquire mechanical contracting businesses in markets in which Limbach Constructors was not then operating.

The anticipation was that some of those markets may only have non-union mechanical contractors operating in those markets, and therefore to facilitate acquisition of the business that was non-union, Jovis Constructors was formed.

If the business to be acquired were then operating non-union it would be acquired by Jovis. If it were a business that was then operating union, it would be acquired by Limbach Company.

Limbach testified that George Harper was president of Harper at the time "we purchased" Harper and George Harper's preference was to operate Harper nonunion.

With respect to his authority over Limbach Company's labor relations, Limbach asserted that he had none. Nevertheless, he testified: "I could revoke the authority in the sense that if I was displeased with the exercise of authority by Steve [Wurzel, president of Limbach Company], I could probably terminate Steve [Wurzel]."

Further testifying (and saying the same was true of Harper), Walter F. Limbach stated, "Mr. [Wurzel] reports to me. If I were dissatisfied with his performance sufficiently that it warranted, I would have the authority to recommend his termination. In that sense I could certainly take over authority."

Limbach further testified that certain employees of Limbach Company terminated their employment with Limbach Company and went to work for Harper when Harper was acquired. There were "five to ten" of these employees during the first year of acquisition. These employees

came from the Limbach National Construction Company where operations were "wound down and terminated."

In testifying about Limbach Constructors, Inc., which is the parent of Limbach Company and Jovis, the parent of Harper, Walter F. Limbach gave the following account: "Limbach Constructors, Inc., in addition to having an ownership interest in its subsidiaries, Limbach Company and Jovis Constructors, Incorporated, also provides general management and a variety of services for mechanical construction activities, including providing those services on behalf of its operating subsidiaries." Such services include "accounting, treasury, legal, personnel, insurance, and employee benefits administrative services." "The subsidiaries are charged an expense charge for their share of the services that they receive." The personnel division develops job descriptions.

Regarding accounting principles, as is true of Limbach Company, "its accounting must be done in conformance with the principals [sic] that are established by and the policies that are established by the Limbach Constructors controllers department." Somewhat similar policies are established by the treasury department which performs service for both Limbach Company and Harper.

Benefits for nonunion employees are administered by the personnel department of Limbach Constructors, Inc.

According to Limbach he "could go out and look at a [job in progress] physically in the field" of either Limbach Company or Harper. Limbach testified that John C. Fern, president of Harper, and Stephen Wurzel, president of Limbach Company, "report" to him and he has authority over them. Walter F. Limbach through Limbach Holdings, Inc. and Limbach Constructors, Inc. appears from this record to be the real power and the dominant figure who administers and controls the conglomerate and its subsidiaries, including Limbach Company and Harper.

At the time many of the events herein occurred Compangie General had not yet acquired Limbach Holdings, Inc. (formerly Limbach, Inc.) which it acquired in December 1986.

2. Structure and operations of Harper

John C. Fern is the president and general manager of Harper. Fern testified that he set "all business policies" and with the vice president of construction sets the labor relations policies but has no "input" in the "day to day operations" of the Charging Party. He further testified that he has "final say of wage levels; that such decisions are not reversible; that he makes final decisions on bidding"; that there is no interchange between the Charging Party and Harper; that Harper performs no work for the Charging Party; that Harper owns its own equipment and borrows none from the Charging Party; that Harper operates only in Central Florida and not in Michigan; that Harper employs about 300 employees; that it has no collective-bargaining agreement with unions.

On cross-examination Fern testified that Jovis "got control of Harper" in July 1983; that Fern was president of Jovis at the time and was "instrumental in the purchase of Harper"; that at the time he worked for Limbach National Construction Company,¹ employees who went to work for Harper who were working for the Charging Party were Dan

Harrity, a former construction manager, Van Eigan, a former vice president, and John Powell; that Fern was president of Harmax Supply, president of Jovis Constructors, senior vice president of Limbach Constructors, Inc., and vice president of Limbach Holdings, Inc.; that Jovis owns Harper, that Jovis is a subsidiary of Limbach Constructors, Inc.; and that Harper purchases from Limbach Constructors "recommendations as to insurance, its costs and its policies is shared with them." Fern further testified that Harper purchases payroll services from Limbach Constructors; that employees were hired who had worked for Limbach; that Fern would give a recommendation on labor relations policy from Walter Limbach, president of Limbach Constructors "very serious consideration"; and that Fern made the decision to operate Harper nonunion.

3. The structure and operations of Limbach Company

Limbach Company is a wholly owned subsidiary of Limbach Constructors, Inc. Stephen Wurzel is president of Limbach Company. Wurzel testified that his duties were "setting the business plans . . . responsible for the operating unit managers . . . for the results of their performances and monitoring all their functions from estimating to labor management to management of their other personnel and redemption of sales and construction commitments in those cities."² Wurzel further testified that he set business policies with the unit managers;³ that "[l]abor relations policies in each of the cities, are delegated by [him] to each of the branch managers"; that no others are involved in labor relations; and that every year he has "to pledge a business plan to Limbach Constructors as to what Limbach Company results are going to be for the upcoming year." Wurzel testified that his boss, Walter Limbach, president of Limbach Constructors, Inc., reviews Wurzel's plans and meets with Wurzel throughout the year "to review [Wurzel's] performance against those plans"; that Walter Limbach has no involvement in the day-to-day operations of Limbach Company or setting labor relations policy; that Wurzel has "nothing to do with" Harper; that there is no interchange of unit employees or transfer of equipment between Limbach Company and Harper, that Wurzel never met or talked with General President Edward Carlough, president of the International Union; and that he did not participate in labor problems between the Union and the Detroit branch.

Walter F. Limbach explained the relationship between Limbach Constructors and its subsidiaries:

In a functional area the authority may in a particular function may rest with management in Limbach Company or management in Harper, and the Limbach Constructors management is a staff function carrying out its responsibilities under the authority of the operating units.

Final authority apparently lies with Walter F. Limbach.

¹ Limbach National Construction Company was a "division of Limbach Company."

² Those cities were Boston, Pittsburgh, Columbus, Detroit, and Los Angeles.

³ An operating unit manager, who is vice president of Limbach Company, is responsible for each of the cities.

4. Alleged secondary boycott

As noted above Walter F. Limbach testified that Jovis was formed to acquire nonunion operating businesses. Pursuant to this object when Harper, a nonunion business, was acquired in July 1983, it was determined that such acquisition would operate nonunion.

On August 10, 1983, General President Edward Carlough of the International Union wrote Walter Limbach of Limbach Company congratulating him on the purchase of Harper and related that a union representative would “arrange a meeting to consummate a labor agreement with your new shop.” Charles W. Prey, president of Limbach Company, replied by letter dated August 23, 1983, asserting that Limbach did not “take over” Harper but that Jovis acquired the capital stock of Harper. It was added that although Limbach Company and Jovis were subsidiaries of the same holding company, Limbach Company had no authority to enter into a collective-bargaining agreement for Harper.

Shortly after August 23, 1983, Limbach received a phone call from Carlough. Carlough reiterated the substance of his August 28 letter indicating that he was looking forward to entering into a collective-bargaining agreement “between a local of his Union and Limbach and Harper.” Limbach advised Carlough that Limbach Company had not acquired Harper and had no authority to enter into a collective-bargaining agreement. Carlough replied that “there had to be a collective-bargaining agreement and that he was going to have Mr. Cassidy⁴ call on me for the purpose of . . . negotiating and entering into such an agreement.”

In late September 1983, Cassidy met with Limbach in Limbach’s office. Cassidy said he was there at the direction of the general president to negotiate and conclude a contract between Harper and a local of the Sheet Metal Workers Union. Limbach explained that Limbach had no authority or control of the labor relations of Harper and could not enter into a collective-bargaining agreement on behalf of Harper. He also explained that Harper had never been a party to any collective-bargaining agreement. Limbach commented that if the Union represented a majority of Harper’s employees that “Harper would without question negotiate in good faith and conclude an agreement.” Cassidy said that would not be satisfactory and “warned me that if Limbach Company persisted in refusing to see to a collective bargaining agreement with Harper that there would be, to use his term ‘labor troubles’ for Limbach Company.”

On November 8, 1983, Carlough again wrote Walter Limbach, Limbach Company, requesting a meeting with him and observing “[a]s it stands now, Walter, you are in violation of your labor agreement in Boston, Pittsburgh, Columbus, and Detroit through the operation in Orlando and it is posing unfair competition for signatory contractors who are doing work in that market area.” At that time Limbach Company was covered by a contract between SMACNA and the Sheet Metal Workers’ International Association Local Union No. 80, and had separate agreements with Sheet Metal Locals in Boston, Pittsburgh, Columbus, Detroit, and Los Angeles.

Sometime after November 8, 1983, Limbach met with Carlough in his office. Carlough insisted on a collective-bargaining agreement between Harper and the Sheet Metal

Workers. Carlough asserted that the collective-bargaining agreement “that existed between Limbach Company and various local[s] affiliated with the Sheet Metal Workers’ International Association, that the terms and conditions of employment of Harper sheet metal employees were covered by the existing agreements of Limbach Company.” Limbach disagreed. Carlough responded that if Limbach persisted the Union would file grievances that would charge that Limbach Company was in violation of its collective-bargaining agreements, “because the Harper employees were not employed under wage rates and working conditions determined by those agreements.” Limbach suggested “secondary boycott.” Carlough continued that at the conclusion of the extant collective-bargaining agreements “he would have his local unions disclaim interest and continued representation of Limbach Company employees and he would refuse to allow them to enter into new collective bargaining agreements with Limbach Company.” Limbach again suggested “secondary boycott.”

Grievances were filed by Boston, Pittsburgh, Columbus, Detroit, and Los Angeles locals in 1984.

Local 80’s grievance, dated December 20, 1984, read as follows:

Limbach Company, Inc. is party to a collective bargaining agreement with SMWIA Local 80. Said agreement incorporates by reference the Standard Form of Union Agreement for the Sheet Metal Industry. Limbach has additional shops or branches in Columbus, Ohio; Boston, Massachusetts; Pittsburgh, Pennsylvania; and Los Angeles, California (under the name of Western Air and Refrigeration Company). Limbach is party to collective bargaining agreements with the SMWIA Local in each of those areas.

In or about 1981, Limbach unilaterally, and without bargaining with Local 80, restructured its corporate organization for the express purpose of becoming a double-breasted contractor. A paper-holding company called Limbach, Inc. was established at the top of the Limbach corporate pyramid. Limbach, Inc. in turn became the 100% owner of a newly-created management company called Limbach Constructors, Inc. The original Limbach sheet metal company—Limbach Co., Inc.—became one of four subsidiaries now wholly owned by Limbach Constructors and has remained a union contractor. However, a sister subsidiary called Jovis Constructors, Inc. was created for the specific purpose of operating as a non-union or open shop sheet metal contractor throughout the United States. In 1983, Jovis purchased a 100% interest in a non-union mechanical and sheet metal contractor called Harper Plumbing & Heating, Inc. which is located in Winter Park, Florida. Since that purchase, Limbach/Jovis has continued to operate Harper as a non-union or open shop contractor.

By virtue of its operation of a nonunion operation—Harper—Limbach is in violation of Articles I, II, III and VIII, Sections 1, 2, 5, 6, and 7 of the Standard Form of Union Agreement. The clauses of the Agreement referred to prohibit a signatory employer from operating any part of its sheet metal business non-union anywhere in the United States. A signatory employer

⁴Cassidy was assistant to the general president.

cannot evade this contractual obligation by the expedient of establishing a wholly-owned subsidiary corporation to operate non-union. Similarly, restructuring a signatory employer into holding companies and subsidiaries for the purpose of creating a double breasted operation, as Limbach has done, also violates the signatory employer's contractual obligation to not operate non-union.

As the remedy for the aforesaid contractual violations, Limbach/Jovis should be ordered to divest its ownership interest in Harper. Additionally, Limbach should be ordered to pay liquidated damages to the Local 80 Joint Apprentice Training Fund in an amount equal to the wage package including fringe benefits it would have paid Harper's sheet metal workers had it operated Harper in accordance with the Agreement and the wage package actually paid to Harper's sheet metal employees since that company was acquired by Limbach/Jovis.

On March 5, 1985, Carlough wrote Cassidy:

Has Andy Pavlich notified Limbach in writing and also the SMACNA Metropolitan District that they will be bargaining independently this year? We don't want to be caught in a TKO situation in terms of time, and if Pavlich has not sent the letter, he should do so immediately. Feel free to discuss this matter with Don Fisher.

Nevertheless, on June 1, 1985, a contract was renewed with Local 80 to which Limbach Company was a party, with an expiration date of May 31, 1988. The following letters of understanding dated June 11, 1986, were appended to the contract:

LETTER OF UNDERSTANDING
BETWEEN
SMACNA METROPOLITAN DETROIT CHAPTER
and
SHEET METAL WORKERS LOCAL UNION #80

A committee composed of two representatives of SMACNA Metropolitan Detroit Chapter and two representatives of Sheet Metal Workers Local #80 will be appointed by the respective parties. This committee will meet to discuss methods and available options to assist the employers signatory to this agreement in combating intrusion by non-union contractors into the jurisdictional area covered by this agreement.

The committee shall thoroughly consider the procedures for implementation of Resolution 78 and the Integrity Clause. Upon agreement of the committee and ratification by Sheet Metal Workers Local #80 and SMACNA Metropolitan Detroit Chapter, the Integrity Clause and other options shall become part and parcel of the Collective Bargaining Agreement between the parties.

It is further agreed that any methods mutually agreed to by this committee will be implemented in accordance with the bylaws of Local #80 and SMACNA Metropolitan Detroit Chapter.

In the event the committee established herein is unable to agree upon a settlement involving Resolution 78 and the Integrity Clause within 30 days after the execution of this agreement, that issue involving Resolution 78 and the Integrity Clause only shall be submitted to the Sheet Metal Workers National Joint Adjustment Board for final and binding resolution.

During the week of March 17, 1985, the General Executive Council considered the question of double-breasted⁵ employers. A communication dated March 22, 1985, from Carlough and Cecil D. Clay, general secretary-treasurer, to business managers of Building Trades Local Unions of the United States and Canada read in part:

The General Executive Council this week devoted a major portion of those sessions to the question of what is usually referred to as double-breasted contractors, but are chose to call "bad faith" contractors.

[A]s a result of the Council's deliberations and action, the policy of this International Association concerning "bad faith" contractors is that they must make a decision that they are either 100% union or 100% non-union.

Enclosed with this communication was a copy of the executive board's resolution and a copy of a model integrity clause that was to be placed in union contracts. The purpose of the integrity clause was to restrict and ban union dealings with double-breasted employers or employers having a dual-mode operation.⁶

On May 1, 1985, the panel notified the International that it was deadlocked on Local 80's grievance.

In a like grievance which involved Local 12 (Pittsburgh), Local 17 (Massachusetts), and Local 108 (Los Angeles) the National Joint Adjustment Board for the Sheet Metal Industry ruled:

⁵ A double-breasted employer as used here is one who operates both union and nonunion establishments.

⁶ Sec. 1 of the integrity clause reads as follows:

A "bad-faith employer" for purposes of this Agreement is an Employer that itself, or through a person or persons subject to an owner's control, has ownership interests (other than a non-controlling interest in a corporation whose stock is publicly traded) in any business entity that engages in work within the scope of SFUA Article I hereinabove using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers' International Association, AFL-CIO in that area.

An Employer is also a "bad-faith employer" when it is owned by another business entity as its direct subsidiary or as a subsidiary of any other subsidiary within the corporate structure thereof through a parent-subsidary and/or holding-company relationship, and any other business entity within such corporate structure is engaging in work within the scope of SFUA Article I hereinabove using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such other business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers' International Association, AFL-CIO in that area.

Local Union 12, 17 and 108 contended that the organization of Limbach into a holding company-wholly owned subsidiary structure, and the acquisition of Harper Plumbing and Heating Company, Inc., an employer performing work within the scope of Article I of the several agreements, that is not signatory to an agreement with a local union affiliated with Sheet Metal Workers International Association, by Jovis Constructors, Inc., a wholly owned subsidiary of Limbach Constructors, Inc., which, in turn, is a wholly owned subsidiary of Limbach, Inc., violated express and implied obligations under Articles I, II, III and VIII of all three agreements.

Local Union No. 17 also contended that the acquisition and operation of Harper Plumbing and Heating Company, Inc. by Jovis Constructors, Inc., violate the provisions of Article II, Section 3 of its current agreement, which by its requirements was intended by the union to prohibit this type of activity. Literally, under this language, the employer is obligated to adhere to the agreement in its Florida operation.

The NJAB, after thoroughly reviewing the records of these cases, and considering the oral presentations of the parties:

1. Was unable to agree, and hence, deadlocked over the issue whether the acquisition and operation of Harper Plumbing and Heating Company, Inc., violated the express provisions of Articles I, II, III and VIII of the three agreements;
2. Found that the acquisition and operation of Harper Plumbing and Heating Company, Inc., violated the express language of Article II, Section 3 of the current agreement between Local Union No. 17 and Limbach Company, Inc.
3. Found further that the current agreement between Local Union No. 17 and Limbach Company, Inc., is either based on mutual misrepresentation of material facts or mutual mistake, or has been executed in circumstances in which there plainly has been no meeting of minds between the said contracting parties. Therefore the current agreement between Local Union 17 and Limbach Company, Inc., is not a valid and binding contract between the parties, and is of no force and effect.

In the May 1986 edition of the "Sheet Metal Workers' Journal" Carlough commented in part:

Nothing poses a greater threat to the security of the Sheet Metal Workers' International Association than the unethical and spreading management practice of double-breasting.

The act of double-breasting is a shell game in which a contractor with a collective-bargaining agreement sets up, under its control, one or more non-union companies to undercut union competitors.

That scheme grew like wildfire among general contractors during the 1970's to such a degree that in many metropolitan areas today, a substantial number of general contractors have two firms, one is union and one is non-union, and bid their work interchangeably.

This has had a serious undermining effect upon the basic union trades in the construction industry. The practice started to mushroom among specialty contractors in the late 1970's and early 1980's and has become a significant problem in that part of the construction industry as well.

Our own Union was virtually isolated with few exceptions from this phenomenon until two to three years ago, since we had always felt our master agreement, the SFUA, outlawed such conduct.

Changes in labor policy by the present national administration [have] made it difficult in some cases to use the old SFUA approach to ban double-breasting. This was the reason for the adoption by your General Executive Council of the Integrity Clause, which we felt was the only useful protection that we had that would stand up legally under the new anti-labor policy. This clause says in effect, if you want to operate as a Union sheet metal contractor you have to do it that way 100% wherever you work. If you do not want to play by the fair rules of the game, then the Union can walk away from your union contracting establishment so that you will be entirely non-union and then, we will do what a union has always had to do to protect its members.

Armed with these new changes in the law, greed has overpowered common sense among some of our contractors. The Limbach Company is one example of this greed. This firm has made all of its money over the years because of the ingenuity and sweat of the Union sheet metal workers; they built the Limbach Company.

The Limbach Company "rewards" their loyal sheet metal workers for their accomplishments by establishing a non-union operation in Orlando, Florida, and letting us know that they think they have the right to establish non-union operations wherever they feel "the market" justifies it.

In other words, says Limbach, we will use your union fellows when we have to and when we do not, we will use the rats. To permit this kind of cheating, would destroy the integrity of the Union. This Company and its subsidiaries have contracts with us in Boston, Los Angeles, Pittsburgh, Detroit and Columbus, with the agreements in Boston, Los Angeles (where it operates as Western Air) and Pittsburgh expiring this year.

It is for this reason that our affiliated local unions in those cities have notified the Limbach Company that they will no longer do business with that Company as of the expiration date of their present agreements. . . .

If the double-breasted contractor succeeds, he will use the non-union operation to grind down decent wages, fringes, and working conditions that this Union has taken almost one hundred years to establish. If he succeeds, the double-breasted contractor will jeopardize pension funds, health funds. SASMI and all of the other outstanding trust funds that have been created for the benefits of our members and their families.

If he succeeds, he will threaten the very security of the sheet metal industry itself. The stakes are high, and your Union is ready. We have developed and imple-

mented a broad scale campaign to excise this cancer from our bodies.

As a means of implementing the Union's policy against double-breasting, Carlough wrote:

The withdrawal card action is only one of numerous actions your Union is taking to counter double-breasted operators:

—Trustees of our trust funds—including the National Pension Fund—have, or will adopt rules that will either eliminate or defer benefits for those few SMWIA members who make the mistake of deserting our union by bolting to the side of non-union contractors.

—We will refuse the use of Resolution 78 to any contractor who takes part in the double-cross of double-breasting.

—We will vigorously pursue our efforts to include our Integrity Clause in all contracts in order to weed out "bad faith" contractors who adopt double-breasted tactics.

At the August 26, 1986 general convention, Carlough made these remarks:

He's a union contractor. Take this message back to Limbach. We are not in the business of getting rid of union contractors. We are in the business of organizing contractors.

We have had to do the men in Boston, in Pittsburgh, in Los Angeles. That was a heavy thing. They are walking away from jobs they had all their life, but they didn't because they feel that strongly about it.

Limbach used to be with SMACNA years ago. You ought to understand the union thinking in the union man's mind. To me it's never too late. It's never too late. The door in this union is open.

If the man wants to come back and operate the right way I know our people, both in Los Angeles and in Pittsburgh, and Walsh and the gang in Boston. If the man wants to straighten out the situation, who knows. He is a very smart fellow.

He wants to straighten the situation out. He will find out he is welcome back in this family. We want them union. We just want him to operate Domanico, the way you operate. Gowan, the way you operate, and Roth, the way you operate. That is what we want.

It was not until February 11, 1988, that the Union took further action. By letter dated February 11, 1988, Carlough of Local 80, directed Andy Pavlich, business manager of Local 80, that "Local 80 of Detroit shall serve notice on Limbach disclaiming the right to represent Limbach's employees after the expiration date of its current collective-bargaining agreement." By letter of the same date, Cassidy informed Pavlich how the disclaimer should be accomplished. A part of the letter reads:

Do not equivocate, in either words or conduct, in your refusal to negotiate with Limbach as part of a multi-employer association. For example if Limbach sends a representative to SMACNA negotiating session, refuse to negotiate with SMACNA until the Limbach

representative leaves. . . . Your cooperation and careful attention to these details is critical to our fight on this very important issue⁷ If you have any questions, do not hesitate to ask.

On February 29, 1988, Local 80 addressed a letter to Limbach Company stating its intent to terminate the current collective-bargaining agreement between it and Limbach Company at its expiration date of May 31, 1988, and "unequivocally disclaim[ed] any and all rights to bargain collectively for and/or on behalf of any individuals employed by your firm."

On March 10, the charges were filed in this case.

On May 21, 1988, the Detroit employees of Limbach met with Pavlich. According to member John Olchowik, Pavlich said (referring to Limbach) "that they're double-breasted and they will not have a contract with Local 80 after May 31, 1988, and that he got a directive from the International to do this. Pavlich said the non-union branch was Harper." According to Olchowik, Pavlich when questioned "where [we would] go to work and do we have to quit" replied, "read the constitution and bylaws of the International." Each member was given a copy of the constitution. Olchowik testified that he quit because he was "afraid [he] was going to [lose his] benefits" and that the "constitution says that you cannot work for a non-union contractor"⁸

On June 13, 1988, the United States District Court for the Eastern District of Michigan, Southern Division, in Civil Action No. 88-CV-72208-DT denied the Regional Director an injunction in a case that involved the same facts and legal principles as are present in the instant case.

On June 14, 1988, Pavlich wrote the employees of Limbach in the Detroit division. After referring to the Court's decision denying the injunction, Pavlich wrote:

As a result of our prior disclaimer of representation rights which took effect on May 31, 1988 and the decision of the Court, we regard Limbach as being a non-union employer. Naturally, we shall treat Limbach as exactly that.

The rights of all the parties are contained in the International Constitution, a copy which is available to you at the Union offices.

On June 14, 1988, after the employees received the June 14, 1988 letter, they walked off Limbach's jobsite of the Detroit branch. About 25 to 80 employees were working at the

⁷The "very important issue" was the Union's thrust against double-breasting.

⁸Pertinent parts of art. 17, sec. 1 of the constitution read as follows:

SEC. 1(a). Except as otherwise provided in this Constitution, any officer or member of this Association or any local union or council thereof may, after trial and conviction on any of the following offenses, be reprimanded, fined, removed from office, suspended or expelled as the evidence may warrant.

SEC. 1(g). Accepting employment in any shop or on any job where a strike or lockout, as recognized under this Constitution, exists, or performing any work covered by the claimed jurisdiction of this Association for any employer that is not a signatory to or bound by a collective bargaining agreement with an affiliated local union of this International Association, unless authorized by the local union.

time. The quitting of these employees, according to Wurzel, put Limbach Company “out of the sheet metal business on those job sites” and Limbach was “prevented from hiring non-union employees to complete the work.”

Olchowik conceded that the following statement by Pavlich taken from a tape recording of the meeting was accurate:

This local union is not going to have any recriminations relative to working for Limbach. The decision is solely yours.

Pavlich testified that Local 80 severed its relationship with Limbach Company because “We’ve taken a position in Local Union 80, that we are not going to deal with double-breasted contractors.” According to Pavlich 2 days later Limbach Detroit employees went to work for another employer.

Conclusion and Reasons Therefor

As noted the Standard Form of Union Agreement Sheet Metal, Roofing, Ventilating and Air Conditioning Divisions of the Construction Industry between SMACNA Metropolitan Detroit Chapter (Employer) and Local 80 of Sheet Metal Workers’ International Association (to which Limbach Company was a party) expired on May 31, 1988. It is conceded that the agreement was what has been termed an 8(f) agreement. Thus, on its termination either party could legally repudiate, terminate, and walk away from the contract and the relationship with each other without offending the Act, unless some legal impediment barred such conduct.⁹ See *John Deklewa & Sons*, 282 NLRB 1375 (1987). The General Counsel finds such impediment in Section 8(b)(4)(i) and (ii)(B) of the Act, which outlaws secondary boycotts in certain specific cases¹⁰ and that she claims to embrace the fact in this case.

⁹In her brief (p. 32), the General Counsel states, “Deklewa unequivocally permits either party to an 8(f) collective bargaining agreement to repudiate the relationship upon the expiration of the contract, without violating Section 8(a)(5) or 8(b)(3) of the Act.”

¹⁰Sec. 8(b)(4)(i) and (ii)(B) provides:

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

.
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [sec. 159 of this title]: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

In her brief (p. 1) the General Counsel concedes “Section 8(b)(4)(B) was designed by congress to prevent a union from applying certain types of pressure on neutral or secondary employers, for its effect on the primary employer with whom the union has its labor dispute, *National Woodwork Manufacturer Assn. v. NLRB*, 386 U.S. 612, 64 LRRM 2801, 2808 (1967).”

The General Counsel’s theory is based on the erroneous assumption that Harper was the primary employer with whom the Union¹¹ had a labor dispute and Limbach was the secondary employer or neutral employer on whom the Respondents were putting pressure to force Harper to sign a union contract or Limbach Constructors, Inc. to divest itself of Harper. The credible facts do not support the General Counsel’s theory for Harper was not a primary employer and Limbach was not a neutral employer. The Union’s dispute was with Limbach Company and Walter F. Limbach, chairman of the board of Limbach Company, and not with Harper. Limbach was the person who had resolved that Limbach Company would operate union and Harper nonunion.

It is clear from the credible evidence that Walter Limbach initiated and implemented the establishment of Jovis in order to effect a doubled-breasted operation, the purpose of which was to put businesses that were acquired operating “non-union” in Jovis and those businesses operating “union” in Limbach Company. Thus he perfected for his operations a means by which he could whipsaw the Union. One need not be an expert in the field of labor-management relations to realize that such a tactic would not be looked on favorably by a union. Such tactics contributed to the International’s adoption of the integrity clause.

When Harper was acquired, the Union had not approached Harper nor did it contact any of Harper’s local management personnel. The Union approached Walter F. Limbach, chairman of the board of Limbach Company, and the holder of other high-level offices with the Limbach conglomerate. For Carlough to have approached Limbach was not unreasonable for he had never dealt directly with the president of Limbach Company and Limbach was the top-level management person and decision maker who, the credible record reveals, could have decided whether Harper was to operate under the Union’s 8(f) contract. It was Limbach who orchestrated the acquisition of nonunion Harper and set the structure for union and nonunion operations. It was Limbach who possessed the power to terminate the heads of Limbach Company and Harper and who exercised authority over them; it was Limbach who could go “physically in the field” and survey their work; it was Limbach to whom subordinates at Limbach Company and Harper were required to submit plans of operations for the upcoming year; it was Limbach who reviewed “performance against these plans.”

During the discourse that occurred between Carlough and Walter F. Limbach, Carlough insisted that the Limbach Company contract covered the Harper employees. On Limbach’s rejection of this idea Carlough, according to Limbach, stated that the Union would file grievances under the Limbach Company contract and on its expiration would not renew it.¹²

¹¹When the term “union” is used hereafter, it includes both the International and Local who were joint participants in the events herein detailed.

¹²The contract, nevertheless, was renewed on June 1, 1985.

Limbach stood pat. The Limbach Company did not extend the contract to Harper.

Thus, on December 20, 1984, the Union did file grievance against the Limbach Company in which it was related that a dispute existed as to whether Limbach Company was violating its contract. Among other things the Union alleged "A signatory employer cannot evade this contractual obligation by the expedient of establishing a wholly-owned subsidiary corporation to operate non-union." Part of the relief sought was that Limbach Company divest itself of ownership interest in Harper. The grievances were aimed at an alleged double-breasted operation and Limbach Company's failure to conform to the Sheet Metal Workers' contract. In this regard it is significant the NJAB "Found that the acquisition and operation of Harper Plumbing and Heating, Inc. violated the express language of Article II, Section 3 of the current agreement between Local No. 17 and Limbach Company, Inc." The Union had maintained that "under this language, the employer is obligated to adhere to the agreement in its Florida operation." This finding is proof positive that there was a legitimate dispute between the Union and Limbach Company. On all other issues, the NJAB was deadlocked.

In the latter part of 1985, the Union's general executive council considered the question of double-breasting and adopted an integrity clause which afforded contractual prohibition against double-breasting. In the May 1986 "Sheet Metal Workers Journal," Carlough explained this action. Among other things he said that it had appeared that the Union had been isolated, with few exceptions, from double-

breasting until 2 or 3 years ago "since we had always felt our master agreement, the SFUA, outlawed such conduct."

"Changes in labor policy by the present national administration [have] made it difficult in some cases to use the old SFUA approach to ban double-breasting. This was the reason for the adoption by your General Executive Council of the Integrity Clause, which we felt was the only useful protection that we had that would stand up legally under the new anti-labor policy." The integrity clause was obviously also aimed at employers other than Limbach Company and would have been, no doubt, less imperative had the Union won its grievance and dispute with Limbach Company.¹³

Accordingly, it follows that there was a legitimate primary dispute between the Union and Limbach Company and that Limach Company was neither a neutral nor a secondary employer within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act. Thus the Respondent Unions have not violated Section 8(b)(4)(i) and (ii)(B) of the Act.¹⁴

[Recommended Order omitted from publication.]

¹³ In regard to the integrity clause, it apparently came up for discussion in the negotiations for the contract that expired on May 31, 1988, for a letter of understanding was accepted by Limbach Company covering the subject. The record is void of any credible evidence that Limbach Company ever accepted the integrity clause.

¹⁴ I have reviewed all the issues raised by the parties in their briefs. It would serve no useful purpose to discuss herein those issues that are not germane to this decision because they have no bearing on the conclusions drawn in this decision.